Supreme Court, U.S.
FILED
DEC 23 1985
JOSEPH F. SPANIOL, JR.

No. 85-920

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*
Repondents,

and

AIR LINE PILOTS ASSOCIATION, INT'L,
Intervenor.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR INTERVENOR AIR LINE PILOTS ASSOCIATION IN OPPOSITION

GARY GREEN
EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
**Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Where Section 43(f) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 43(f), 92 Stat. 1705, 1750 (1978), contains an admittedly unconstitutional legislative veto proviso, did the Court of Appeals correctly conclude that the veto proviso was severable from the remainder of § 43 because Congress would have preferred continuation of the labor protective provisions of § 43 without the veto rather than nullification of the entire Section?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTER STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. The Court of Appeals Correctly Sought to Ascertain The Dominant Intent of Congress In Determining Whether The Invalid Veto Proviso Should Be Severed From The Remainder Of Section 43	5
II. The Court of Appeals Correctly Concluded That Congress Would Have Preferred The Employee Protection Plan of § 43 With The Veto Proviso Severed Out To An Airline Deregulatory Statute Stripped Of Any Employee Protection Plan	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES: Page

Buckley v. *Valeo*, 424 U.S. 1 (1976) 5

Champlin Refining Co. v. *Corporation Comm'n*, 286 U.S. 210 (1932) 5

EEOC v. *CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984) . . 7

Gulf Oil Corp. v. *Dyke*, 734 F.2d 797 (TECA 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 173 (1984) 6

Immigration & Naturalization Service v. *Chadha*, 462 U.S. 919 (1983) ..... *passim*

McCorkle v. *United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) 8

Regan v. *Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 82 L.Ed. 2d 487 (1984) 3, 5-6

MISCELLANEOUS

S. Rep. No. 631 95th Cong., 2d Sess. (1978) 2

H. Rep. No. 95-1211, 95th Cong., 2d Sess. (1978) 2

48 Fed. Reg. 52,854 (1983) 3

Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 1

Section 43, Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, codified at 49 U.S.C. Sec. 1552 ..... *passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-920

ALASKA AIRLINES, INC., *et al.*,
Petitioners,

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, *et al.*,
Respondents,

and

AIR LINE PILOTS ASSOCIATION, INT'L,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE AIR LINE PILOTS ASSOCIATION IN OPPOSITION

COUNTER STATEMENT OF THE CASE

The Airline Deregulation Act of 1978 ("ADA"), Pub. L. 95-504, 92 Stat. 1705 (October 24, 1978) reduced government economic regulation of the airline indus-

try in order to promote greater competition among carriers. The ADA was intended to substantially increase the ability of new carriers to enter the industry, of existing carriers to expand into new markets, and of all carriers to set fares and schedules based on market conditions. *E.g.*, S. Rep. No. 631, 95th Cong., 2d Sess. pp. 1-5 (1978); H. Rep. No. 95-1211, 95th Cong., 2d Sess. pp. 1-5 (1978). The impact of airline deregulation on airline employees was the subject of discussion in Congress. On the one hand, it was thought that increased competition would ultimately result in an increase in airline employment. On the other hand, it was recognized that deregulation could have adverse consequences for at least some airline employees because, with increased competition, carriers could lose as well as gain business. Appendix to Petition for Certiorari ("Pet. App. ___"), pp. 20a, 22a, n. 11 at 22a. Congress resolved the matter by including in the ADA as Section 43 (92 Stat. 1705, 1750, codified at 49 U.S.C. App. § 1552 (1982)) labor protective provisions which (1) authorized, subject to later appropriations, financial assistance to employees displaced as a result of deregulation, and (2) granted a hiring preference, referred to as "first right of hire", to furloughed or terminated employees meeting certain statutory criteria.

The Secretary of Labor was directed to issue rules and regulations necessary to administer the employee protection provisions of § 43. However, the Secretary's authority in this regard was limited by a proviso in § 43(f) which not only required him to give advance notice of any rule or regulation he intended to issue to designated House and Senate committees, but also allowed either House of Congress to veto

any such rules and regulations by majority resolution. It is undisputed that the legislative veto incorporated in § 43 is unconstitutional in light of this Court's decision in *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983).

To date, the financial assistance portion of § 43 has not been funded and the Secretary of Labor has issued no regulations implementing that program. Pet. App. 3a. With regard to "first right of hire", final regulations were published by the Secretary on November 22, 1983 (48 Fed. Reg. 52,854 (1983)), were duly transmitted to Congress, and were to become effective after sixty legislative days. Pet. App. 5a. Before the regulations became effective, however, Petitioners herein filed a complaint against the Secretary of Labor in United States District Court for the District of Columbia asserting, *inter alia*, that § 43 and the regulations issued thereunder were invalid because of the unconstitutional legislative veto in § 43(f) which, it was argued, could not appropriately be severed from the remainder of the Section. The District Court agreed, issuing an order and opinion to that effect on May 17, 1984 and May 18, 1984, respectively. Pet. App. 5a-6a, 30a-37a.[1]

On July 16, 1985, the Court of Appeals for the District of Columbia Circuit reversed. Pet. App. 1a-29a. The Court, citing this Court's decisions in *Chadha, supra*, 462 U.S. at 931-32 and *Regan* v. *Time*,

---

[1]The Air Line Pilots Association, International ("ALPA") and several other unions intervened in the district court action against the Secretary of Labor. ALPA is a labor organization which represents approximately 34,000 commercial airline pilots for collective bargaining purposes. Implementation of § 43 is of vital interest to a significant number of ALPA's members.

Inc., ___ U.S. ___, 104 S.Ct. 3262, 3269 (1984), held that it was far from " '*evident*' that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality." Pet. App. 19a. On the contrary, "what evidence there is indicates that Congress had a strong, humanitarian desire to provide for airline employee protection; in contrast to this clearly expressed intent to erect protective safeguards for displaced workers, Congress expressed relatively little concern about the veto provision." *Ibid.* In the Court's view, "the evidence . . . positively indicates that Congress would have preferred the employee protection plan with the veto provision severed out to a deregulatory statute stripped of any employee protection plan." *Ibid.* Indeed, "there is not a shred of evidence that the veto provision was deemed to be a vital feature of the protection plan." Pet. App. 28a.

SUMMARY OF ARGUMENT

The applicable standard for determining whether the invalid legislative veto proviso contained in § 43 can be severed from the remainder of § 43 is that set forth in this Court's decision in *Chadha, supra*: whether it is evident that Congress would not have enacted § 43 but for the inclusion of the veto proviso. The Court of Appeals followed that standard in the instant case by concluding that, as between preserving § 43 and tearing down the section in its entirety, the latter would be far more destructive of the Legislature's will than the former.

The Court's conclusion is amply supported by legislative history, which clearly demonstrates that Congress placed considerable emphasis on according

airline employees protection from the impact of deregulation, but did not deem the veto proviso to be an essential part of § 43. Circumstantial evidence to the contrary relied on by Petitioners was properly weighed by the Court of Appeals but was not found persuasive.

ARGUMENT

I. The Court of Appeals Correctly Sought to Ascertain The Dominant Intent of Congress In Determining Whether The Invalid Veto Proviso Should Be Severed From The Remainder Of Section 43

In deciding the severability issue in this case, the Court of Appeals adhered to the standard mandated by this Court. Thus, the Court of Appeals began its own analysis by focusing on this Court's "instructive" statement in *Chadha, supra,* that "the invalid portions of a statute are to be severed '[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " Pet. App. 16a, quoting from *Chadha,* 462 U.S. at 931-32, which, in turn, quotes from *Buckley* v. *Valeo,* 424 U.S. 1, 108 (1976), and *Champlin Refining Co.* v. *Corporation Comm'n,* 286 U.S. 210, 234 (1932). The Court of Appeals likewise recognized that *Chadha* places the "burden . . . squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provision [in question] without the severed portion." Pet. App. 17a. The Court of Appeals further recognized that "[t]his presumption [of severability] articulated by *Chadha* was echoed in a later Supreme Court severability case: 'Whether an unconstitutional provision is severable from the remainder of the stat-

ute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability." Pet. App. 17a-18a, quoting *Regan* v. *Time, Inc.*, ___ U.S. ___, 104 S.Ct. 3262, 3269, 82 L.Ed.2d 487 (1984).

Petitioners do not appear to quarrel with the foregoing. They argue, however, that the Court of Appeals should have considered whether Congress would not have passed some alternate version of § 43 if it knew that it could not lawfully include the veto proviso. *E.g.* Pet. 9. And they fault the Court of Appeals for responding to this argument in the same manner as the Temporary Emergency Court of Appeals responded to a similar argument in *Gulf Oil Corp.* v. *Dyke*, 734 F.2d 797, 804 (1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 173, 83 L.Ed.2d 108 (1984): "the question is not whether Congress would have enacted th[is] *exact* statute[ ] had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred th[is] statute[ ], after severance of the legislative veto provision[ ], to no statute[ ] at all." Pet. App. 18a.

Petitioners' contentions, we submit, do not raise any issue which warrants consideration by this Court in light of the "[a]mple evidence" that the employee protection program was deemed by Congress to be an important part of the ADA and the contrasting lack of evidence that the veto proviso was regarded as critical. Pet. App. 28a. Thus, the result reached by the Court of Appeals is virtually mandated by the presumption of severability set forth in *Chadha* and reaffirmed in *Regan*. But even if that were not so, the Court of Appeals did not err by considering the severability question based on the likely legislative

intent with respect to the current alternatives. The Court had to choose between severability and inseverability. If inseverability was the choice, it is undeniable that there would literally be "no airline employee protection provision at all" (Pet. App. 19a) in the ADA. To be sure, as the Court of Appeals was undoubtedly aware, Congress could, if it desired to do so, pass new legislation to remedy the deficiency. However, the Court had no reason to believe that this is what Congress would have wanted. Indeed, given the delay involved and the probability that Congress would be preoccupied with other pressing legislative business, the Court had every reason to believe otherwise. Accordingly, the Court's assessment of the situation—as succinctly put in the concurring opinion of Judge Ginsburg—is entirely accurate: "only one genuine issue appears: would Congress have preferred excision of the veto provision to demolition of the airline employee protective prescriptions." Pet. App. 29a. As between "excision" and "demolition", the Court quite properly concluded that the choice most consistent with the dominant intent of Congress when it enacted § 43 was preservation of that section without the veto rather than destroying the section in its entirety.

Contrary to Petitioners (Pet. 16-20), this case does not create a conflict in the circuits over the appropriate severability analysis. As Petitioners acknowledge, the underlying issue in the cases they cite is whether Congress would have delegated such broad authority without a veto provision. Pet. 19. *E.g. EEOC* v. *CBS, Inc.*, 743 F.2d 969, 971 (2d Cir. 1984) ("whether Congress would have delegated to the President the broad reorganizing authority granted

him by the Act without reserving for itself the one-house veto power . . ."); *McCorkle* v. *United States*, 559 F.2d 1258, 1262 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978) (whether Congress would have granted the President the power to set congressional, executive, and judicial salaries without a veto restriction). So here, as the Court of Appeals framed the issue—*i.e.*, whether "it is *evident* that Congress would not have passed the section had Congress known that the veto provision would disappear on account of its unconstitutionality" (Pet. App. 19a)—the question likewise is whether Congress would have granted the rule-making authority it did in § 43 without a veto provision. As we now show, the appellate court's review of the legislative history left little doubt that enactment of § 43 did not hinge on inclusion of the veto proviso, and does not justify further review by this Court.

II. The Court of Appeals Correctly Concluded That Congress Would Have Preferred The Employee Protection Plan of § 43 With The Veto Proviso Severed Out To An Airline Deregulatory Statute Stripped Of Any Employee Protection Plan

The "numerous comments" in the committee reports and in floor debate cited by the Court of Appeals (Pet. App. 20a-23a) fully support the Court's conclusion that Congress attached considerable importance to the employee protection plan embodied in § 43. By contrast, the Court found that "the only discussion . . . with respect to the veto provision is a solitary comment by then-Representative Elliot Levitas of Georgia expressing approval of the presence of a legislative veto in the provision." Pet. App. 23a. As the Court observed, "this sole source [is] a thin reed for

eviscerating an entire remedial system fashioned out of humane Congressional concern for adversely affected airline employees." *Ibid.*

Nor do the "various items of circumstantial evidence" (Pet. App. 24a) which Petitioners relied on below, as they do here (Pet. 20-22), provide any stronger reed to support their position. Thus, Petitioners contend that a veto proviso was inserted in § 43 because Congress adopted a novel Senate employee protection plan instead of the more traditional House approach. Pet. 21-22. However, as the Court of Appeals pointed out (Pet. App. 27a-28a), the Senate plan offered less protection to employees than did the House approach; hence, it "seems . . . unlikely that a program offering less protection would have occasioned a call for even greater legislative control over the bureaucracy." Pet. App. 28a. Moreover, there is "no evidence" that the House's agreement to the Senate version of the protection plan was given in exchange for beefing up the veto device." *Ibid.*

Petitioners fare no better with their contention that the importance of the legislative veto proviso in § 43 is demonstated by the fact that a veto proviso appears nowhere else in the ADA. Pet. 21. As the Court of Appeals stated, the ADA is essentially a deregulatory statute in which § 43 stands out as the exceptional regulatory provision; ". . . as a matter of common sense, [it is] the regulatory provision which would be the most likely candidate for inclusion of a legislative veto device." Pet. App. 25a.

Finally, Petitioners urge that the Court of Appeals ignored the significance of the unique combination in § 43 of a "report and wait" proviso and a legislative veto proviso. Pet. 20. The combination may be unique,

but its significance is elusive. The Court of Appeals quite properly regarded it as indicative of understandable Congressional interest, but falling far short of establishing that degree of interest which would make it "evident" that Congress would not have enacted § 43 in the absence of the veto proviso. Pet. App. 25a.

CONCLUSION

For the reasons stated above, the Intervenor Air Line Pilots Association respectfully requests that the petition for *certiorari* be denied.

Respectfully submitted,

GARY GREEN
EUGENE B. GRANOF*
AIR LINE PILOTS ASSOCIATION
1625 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-4119
Counsel for Air Line Pilots Ass'n
**Counsel of Record*

December 23, 1985